6210

Supreme Court of the United States,

OCTOBER TERM, 1903.

NICHOLAS C. BENZIGER and LOUIS BENZIGER, composing the firm of BENZIGER BROTHERS,
Petitioners,
vs.
THE UNITED STATES.
No. 54.

This is a proceeding to review a decision of the Circuit Court of Appeals for the Second Circuit, in the cause above entitled, affirming a decision of the Circuit Court of the United States for the Southern District of New York, which affirmed a decision of the Board of General Appraisers, sustaining the action of the Collector of the Port of New York in assessing duty upon articles imported by petitioners. A writ of *certiorari* to review said decision was issued by this Court on June 11, 1902 (Rec., fols. 92–93).

Statement of the Case.

On the 25th of March, 1899, petitioners imported into the port of New York certain casts representing scriptural characters. One was a figure representing St. Vincent of Paul, imported for the use and

by the order of St. Mary's Orphan Asylum, located at Norfolk, Va.; one statue of St. Anthony, imported for the use and by the order of Sacred Heart Church, located at Bloomfield, N. J; one statue of St. Anthony, imported for the use and by the order of St. Mary's Church, located at East Saginaw, Mich., and two statues of Adoring Angels, imported for the use and by the order of St. Joseph's Church, located at Dayton, Ohio (see letter of Collector of Customs, Record, p. 6, fol. 10). Upon these articles the Collector of the Port of New York assessed duty at 35 per cent. (fol. 10). Against this exaction the importers in due time and in the manner provided by law filed a protest, claiming the casts to be exempt from duty under paragraph 649 of the Free List of the Tariff Act of July 24, 1897, then in force (fol. 11).

No question is raised in this case as to the Collector having exacted the proper rate of duty under the proper paragraph of the law if the articles in question were dutiable at all, and were not exempt from duty by virtue of the special provision of the Free List referred to in the protest. The paragraph under which the duty was assessed provides, among other things, for manufactures of plaster of Paris, *not specially provided for in this act.* The contention of the importers is that these casts were specially provided for in paragraph 649 of the Free List, which reads as follows:

> "Regalia and gems, statuary and specimens or *casts of sculpture, where specially imported in good faith for the use and by order of any society incorporated or established solely for religious,* philosophical, educational, scientific, or literary *purposes,* or for the encouragement of the fine arts, or for the use and by order of any college, academy, school or seminary of learning in the United States, or any State or public library, *and not for sale;* but the term 'regalia,' as herein used, shall be held to embrace only such insignia of rank or office or emblems as may be worn upon the person or borne in the hand during public exercises of the society or institution, and shall not in-

clude articles of furniture or fixtures, or of regular wearing apparel, nor personal property of individuals."

The protest of the importers was transmitted in accordance with Section 14 of the Customs Administrative Act to the Board of General Appraisers. This Board took certain so-called testimony which appears in the record, pages 16–55. Thereafter they overruled the protest and sustained the action of the Collector. Their decision will be found on pages 8-14 of the record. A petition for review was thereupon filed by the importers (Rec., pp. 1–4). The case was heard in the Circuit Court on the record sent up by the Board of Appraisers, and the Circuit Court affirmed the decision of the Board. The opinion of Judge Townsend will be found in the record (fols. 76–79). The importers appealed to the Circuit Court of Appeals, which affirmed the decision of the Circuit Court, stating that it did so on the opinion of the Court below (Rec., fol. 88).

Specification of Errors

The Circuit Court of Appeals erred in affirming the decisions of the Circuit Court and Board of General Appraisers holding these articles to be dutiable, and in not sustaining the protest of the importers and holding them to be exempt from duty under paragraph 649 of the Act of 1897 as *casts of sculpture imported in good faith for the use of a society established for religious purposes.*

Argument.

As already pointed out there was no opinion written in this case by the Circuit Court of Appeals. Opinions were written by both the Board of Appraisers and the Judge of the Circuit Court. These decisions, while both against the importers, were largely based on different grounds. It will apparently facilitate the determination of the controversy

to consider: First, the grounds assigned by the Board of Appraisers for overruling this protest. Second, the grounds assigned by the Circuit Court for its decision in favor of the Government, and Third the grounds upon which the importers base their claim to free entry.

I.

The arguments of the Board of General Appraisers.

The Board of Appraisers referred to these articles in their decision as moulded statuary (fol. 22,) stating that the aritcles are not in fact casts of sculpture. This suggestion seems hardly to require any answer. The word "sculpture" is thus defined by Webster:

> "The art of carving, cutting or hewing wood, stone, metal, &c., into statues, ornaments, &c., or into figures as of men, beasts or other things; hence the art of producing figures in groups, whether in plastic or hard material."

The following is the definition of the word "cast" in Webster's Dictionary, both as a noun and a verb:

> "Cast, n., that which is formed in a mold; especially a reproduction or copy, as of a work of art in bronze or plaster.
>
> Cast v., to form in a particular shape by pouring liquid metal or other material into a mold."

There can be no question that such figures as are described in the findings of the Board are in fact and in common speech casts of sculpture, as they have been held to be in decisions presently to be reviewed by the Treasury Department, and the fact

that they are casts of sculpture cannot be obliterated by calling them moulded statuary.

At folio 14 the Board of General Appraisers say that the articles in question are of a class which was known in commerce, in art, and to classifying officers of customs of the United States on July 24, 1897, and for many years prior thereto as statuary —specifically, as church statuary, and at folio 22 they repeat that assertion and say, "paragraph 649 of the Tariff Act provides for statuary and specimens or casts of sculpture. The articles in question cannot be both."

The finding of the Board that these articles have been known in commerce as statuary or church statuary is apparently based on the testimony of two witnesses, each connected with the same establishment, namely, a man named Antonio Da Prato, who is a manufacturer at Charlestown, Mass. (Rec., fols. 66–72), and a salesman for a domestic establishment called the Da Prato Statuary Company (Rec., fols. 56–66). Such testimony is not, within the decisions of this Court, sufficient upon which to establish a commercial designation.

Maddock *v.* Magone, 152 U. S., 368.
Sonn *v.* Magone, 159 U. S., 417.

It would, however, make but little difference whether these articles were specifically known in commerce as church statuary or not, there being no provision in the law for church statuary, or, as we shall presently see, for any cast statuary at all. If these articles are casts of sculpture within the meaning of the law, it is of no consequence whether they have or have not been known as church statuary.

The finding that these articles have been known in art as church statuary is, as far as we have been able to discover, based on no evidence whatever. The artists who were called as witnesses seemed anxious to show that they knew nothing about

these articles whatever, and that they were not known to art or recognized by art.

The finding that these articles have been known to classifying officers of the customs for many years as church statuary is apparently based on the testimony of one witness, who is an examiner in the Appraiser's Department at New York (see Rec., pp. 53–54). All that this witness testified was that for a period of eight years he had, in accordance with the instructions of an assistant appraiser named Stevens, returned such articles as these as church statuary. On the other hand, any such return was contrary to the ruling of the Treasury Department, whose duty it is (Section 251 of the Revised Statutes) to lay down the rules by which the classifying officers shall be governed, and which, in a decision in 1893, to be hereafter more fully discussed, distinctly held such articles to be free as "casts of plaster of Paris."

We are unable to understand the meaning of the Board's suggestion that articles cannot be both statuary and casts of sculpture. It is familiar to every one that many articles may be and are both. With practically few exceptions, all bronze statuary, from the lowest class to the highest is cast, and would certainly be known both as statuary and as casts of sculpture. The Board itself refers (Rec., fol. 18) to casts of sculpture exhibited at the Metropolitan Museum of Art in New York. We think nobody would pretend to deny that these casts were statuary. Casts of sculpture not imported for the societies described in the free list provisions were always held dutiable as statuary until in 1890 Congress limited the word "statuary" by providing that it should refer only to such articles as were cut by hand from a solid block of marble, stone, alabaster or metal.

The principal argument of the Board of General Appraisers for overruling the protest of the importers is that the articles in question are not works of high art or works of art at all, are not made by

professional sculptors from models of their creation, but are made in molds by artisans in industrial establishments. If these articles had not been imported for the use of churches but were imported for sale as part of a dealer's stock and were claimed to be dutiable as statuary under paragraph 454 of the Tariff Act, which provides that "the term 'statuary' shall be understood to include only such statuary * * * as is the professional production of a statuary or sculptor only," this argument would be unanswerable, and, in view of the fact that this limitation in paragraph 454 is made to apply to the term "statuary," as used in this act, the argument would be equally unanswerable if the exemption of this merchandise from duty was claimed under the provision for statuary in paragraph 649. But the term "cast of sculpture," as used in paragraph 649 is subject to no such limitation, and when Congress has not seen fit to impose such a limitation the Board of General Appraisers have no right to inject it.

The adverse decision of the Board of General Appraisers is largely predicated upon the fact which is not, and never has been questioned, that the price of these articles depends very largely upon the gilding or decoration which fits them and adapts them for use in churches. As this is also the principal ground assigned by the Circuit Court for its decision it will be more convenient to discuss it at a later stage of the argument when we come to review the decision of the Circuit Court.

A further ground assigned by the Board of General Appraisers for overruling the protest of these importers is found in their attempt to restrict the term "casts of sculpture" as used in paragraph 649 to the cast which is made by a sculptor from his clay model when he is preparing to carve a statute from stone or marble, and as to which the Board say:

> "These plaster of Paris models are known in commerce and in art as casts of sculpture."

So far as this suggestion refers to the designation of such plaster models in commerce, it must be quite obvious that there is nothing to base it on. Models which sculptors make and use in their work of preparing a statue are certainly not objects of commerce at all in any reasonable sense of the word "commerce." It may be doubted whether any such article was ever bought or sold. If a case of this kind ever occurred it would certainly be an exceptional and isolated transaction. The original manuscript of a celebrated author might be sold as a curiosity, but certainly no one would ever speak of author's manuscripts as being articles of commerce. The whole language of paragraph 649 makes it plain that the words therein used are not used in any commercial sense. None of the articles therein named are exempt if they are imported for sale, and *sales constitute commerce.*

It must also be entirely clear that to give the term "casts of sculpture" the restricted scope suggested by the Board of General Appraisers would be to completely nullify the legislation of Congress. No one has ever yet been able to suggest how or why or under what conceivable circumstances churches would import for their own use the plaster models of sculptors. This point was duly brought to the attention of the Board by inquiries addressed to the witnesses. Thus the witness Rhind was asked (fol. 31).

> "Q. As to those casts that you spoke of that are part of a process such as made by an artist when he is preparing to create a statue, have you ever seen those exhibits here in churches as a part of the decoration of the church?
> A. No."

The witness Zolnay was asked (fol. 37):

> "Q. Do they (referring to sculptor's plaster models) ever form part of the ornamentation or decoration of churches?
> A. No."

The suggestion or intimation in the opinion of the Board of General Appraisers that the witnesses (sculptors) called by the Government at the hearing before the Board all testified that these articles were not casts of sculpture will be found not to be borne out by the evidence at all. A brief review of it may be interesting.

The first witness examined, Mr. Bruckstuhl, practically based his claim that these articles were not casts of sculpture on the fact that they were gilded or ornamented. He testified (fol. 28):

> "Q. *They are casts of sculpture in a certain sense*, of course. * * * A cast of sculpture ceases to be a cast of sculpture as soon as it is painted."

The next witness, Rhind, being asked as to these articles (fol. 31):

> "Q. Well, *are they casts of any kind of sculpture*, whether ancient or modern?
> A. *I am not sure.*"

The third witness, Karl Bitter, undertook to restrict the term casts of sculpture, as the Board does, to the plaster models of a sculptor, but being further examined testified (fol. 33):

> "Q. Do you consider these articles that you saw here to-day then, casts from sculpture?
> A. Yes, I do.
> Q. You think from sculpture, although according to your definition they are not casts of sculpture? A. Yes, sir."

The next witness, Herbert Adams, clearly based his statement that these articles are not casts of sculpture on the same untenable rule advanced by the Board of Appraisers, namely, that the term "casts of sculpture" is restricted to the plaster models of a sculptor. Thus he testified (fol. 34):

> "As I understand it, the term casts of sculpture in the profession is understood to

mean the reproduction of the artistic work in plaster as an intermediate stage between the modeling and the clay and the final execution in permanent material.

Q. In other words, it is part of the process of making a statue?

A. It is part of the process of making a statue.

Q. In solid material?

A. Yes."

The next witness, Mr. Zolnay, was asked by the Government counsel (fol. 36):

"Q. Please *state whether or not in your opinion these figures* are specimens or *casts of sculpture?*

A. *Yes, certainly they are in plaster cast.*"

The witness then went on to make the claim that they ceased to be casts of sculpture because they were gilded.

The next witness, W. R. O'Donovan, testified (fol. 38):

"Q. Are those moulded articles you examined what you understand to be specimens or casts of sculpture?

A. They are, necessarily; *they are casts* or specimens *because they are sculpture.* What grade of sculpture they are is another question."

The next witness Paul Bartlett was asked (fol. 39):

"Q. Now, Mr. Bartlett, you are not willing to swear that those figures are not *casts of sculpture?*

A. *I am not willing to swear they are not.*"

The next witness, Albert Weinert, testified (fol. 40):

"Q. Will you please state whether these figures are specimens or casts of sculpture?

A. *I think they are plaster casts of sculpture.*

Q. Are these articles of sculpture—please leave the plaster out; are they moulded casts of sculpture?

A. *They are casts of sculpture*, yes."

The next witness, Purio Piccirilli, testified (fol. 42):

"Q. Do you call those casts of sculpture?

A. I may call them casts of bad sculpture.

Q. *Are they such articles as you have heard artists call casts of sculpture?*

A. *Yes, sir.*"

Now, it is respectfully submitted, in view of this testimony, that so far from the evidence fairly showing that these articles are not known to artists as casts of sculpture on the other hand it distinctly shows affirmatively that they are known as casts of sculpture, and so far as any testimony given by these witnesses suggests that these articles are not casts of sculpture it will be found to be based entirely on either one of the fundamental errors which have crept into the decisions of the Board of Appraisers and of the Circuit Court, either that the term "casts of sculpture" must be restricted to the plaster model which a sculptor makes when he is creating a statue or that articles which are indisputably casts of sculpture cease to be such the moment you apply any gilding or decoration. The testimony taken as a whole will be found to very clearly bear out this assertion.

At folios 20 and 21 the Board of Appraisers refer to a decision of the Treasury Department in 1883 (SS. 5549) acquiescing in the result of the trial of a customs suit at New York. The Board makes statements as to the place where the goods in question in that suit were manufactured, and of the material of which they were manufactured, which are not borne out by anything contained in the printed decision to which they refer, and which from any point of view are clearly irrelevant to the present controversy. They then go on to state the results of an investigation made in 1883 by officers of the

Treasury Department concerning the firm of Mayer & Company, of Munich, and make certain comments upon the recklessness of that firm's testimony in the case referred to by the department. Mayer & Company are not the parties to this case. The alleged facts injected into this record are not established by any evidence of any kind taken in the case or appearing in the record, and apparently from their nature could not be, and it is respectfully submitted that, in view of this situation and especially of the fact that the statements are wholly irrelevant, their insertion in the decision was an impropriety and an indication of prejudice and bias.

In the concluding paragraph of their opinion the Board of Appraisers state that the change in the language of the Act of 1897, whereby the qualifying words "respecting statuary" were made applicable not only to the dutiable statuary provided for in Schedule N, but to statuary wherever provided for in the act, was a radical change. True it was radical and the Court should give it no less effect than Congress intended, but *they have no right to extend it.* The effect of it is to prevent marble or other statuary (not cast) from being imported for churches, colleges, etc., unless it is cut by hand from a solid block and is the professional production of a statuary or sculptor, without the payment of duty. What the Board of Appraisers have sought to do is to extend the application of it to casts of sculpture, although Congress itself saw fit to impose no such limitation. And, as we shall hereafter show, so far from all the facts indicating that Congress intended to impose any such limitation, every legitimate inference is that they did not intend it and therefore did not do it.

The Board also notes as a radical change the omission in paragraph 638 of the present Act of the words "statuary, casts of marble, bronze, alabaster or plaster of Paris" which were in paragraph 585 of the previous act and in corresponding paragraphs of older acts. A very slight examination of the Tariff

Act of 1894 and 1897 will demonstrate the fallacy of this contention. It is true, as the Board state, that paragraph 585 of the Tariff Act of 1894 expressly exempted from duty, "statuary, casts of marble, bronze, alabaster or plaster of Paris imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or for encouragement of the fine arts, and not intended for sale," but, it is also true (though they fail to mention it), that paragraph 603 of the Act of 1894 also exempted from duty statuary and specimens or casts of sculpture where specially imported in good faith for the same identical institutions. In other words, Congress found that in an existing Tariff Act it had provided for exemption of the same class of articles for the same institutions in two different paragraphs. When they came to change the law, they naturally dropped one of these provisions as superfluous and that is the extent of the radical change they made. They left in paragraph 649 of the present act the words "specimens or casts of sculpture," which are the broader of the two expressions, and of course include casts of marble, bronze, alabaster or plaster of Paris, and dropped the other words. In other words, as Congress was giving full exemption from duties to these articles in paragraph 649 of the present act (which corresponds generally with paragraph 603 of the Act of 1894), it considered it unnecessary to repeat in paragraph 638 of the present act the exemption, which had been provided in paragraph 585 of the Act of 1894. If, as the Board state, it was the deliberate purpose of the Congress to exclude from free admission and relegate to the dutiable schedules, according to their component materials, casts of marble, bronze, alabaster or plaster of Paris, why did they insert in paragraph 649 an exemption for casts of sculpture?

The Board adds to this remarkable finding that this (referring to what they incorrectly held Con-

gress to have done) was done in the interest of domestic industry and of the revenue. On the contrary, we assert that this was not done, and that the reason why it was not done was the same reason which had prevailed in tariff acts for many years, to wit, in the interest of education and religion.

II.

The decision of the Circuit Court.

We have already suggested in the early stages of this discussion that the Board of Appraisers laid considerable stress upon the fact that these ecclesiastical figures were painted or gilded and that this constituted by far the larger part of their value. But it does not seem to have occurred to the Board to hold that the gilding and the painting, although they had enhanced the value of the cast had changed them into anything other than casts. True, some of the witnesses had suggested that the moment you decorated or gilded a cast of sculpture it ceased to be a cast of sculpture, but the Board did not go so far as to predicate on any such testimony any suggestion that the casts of sculpture had by decoration and gilding been manufactured into something else. Yet this is the proposition which seems to have controlled the mind of the learned Judge in the Circuit Court, for we find him stating in his opinion the following:

> "It is not necessary, however, in the disposition of this case to determine whether such objects, if imported in a crude state would be free of duty under said paragraph. They have been advanced by the skill of the artist from a mere manufacture from composition to a completed decorative object * * *. Such objects are not casts of sculpture."

This naturally suggests the inquiry, if these articles are not casts of sculpture what are they? The law is well settled that to convert a crude article into a manufactured article, it must have been subjected to such processes as to change its identity and give it a new name, character and use. Now, what new name, character or use has a gilded or painted figure of St. Anthony or St. Joseph as compared with one which is not painted or gilded? In according free admission to casts of sculpture imported for churches, Congress did not suppose it was providing for mere "manufactures from composition." It obviously contemplated the importation of casts of sculpture so prepared as to be suitable for the decoration of churches, and it is well known that casts for this purpose require to be and usually are decorated. Churches (especially those of the denomination which most largely uses these devotional figures) are apt to be dimly lighted, and casts which were not colored could be appreciated only by those who stood close to them to examine their character. To perform their functions of so decorating a church, that those seated in its pews may have their devotional feelings inspired, and their religious aspirations exalted by a contemplation of these figures, they require to be, and usually are, colored, gilded and otherwise decorated. Congress knew of this as well as we know it, and it is a fanciful supposition that Congress intended that such articles, if imported in plain white, should be admitted free, but, if colored, should become dutiable as "manufactures of plaster of Paris."

In respect to this suggestion of the Circuit Court, the case of Hartranft *v.* Wiegmann (121 U. S., 609) is directly in point. The articles there in question were shells which had been cleaned, polished, ground on an emery wheel, and had the Lord's Prayer etched upon them. They had been classified as "manufactures of shell," and were claimed to be "shells, not manufactured." This Court thus disposed of the Government's contention:

> "We are of opinion that the shells in question here were not manufactured, and were not manufactures of shell. *They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.* The application of labor to an article, either by hand or by machinery, does not make the article necessarily a manufactured article within the meaning of that term as used in the tariff law."

Now we submit that the artistic labor, which had been applied to these casts of sculpture after they came from the mould to fit them for the purpose for which they were designated, had not converted them into anything but casts of sculpture. They were still casts. They had acquired no distinctive name, character or use. If we were dealing with two provisions of the dutiable schedules, one of which provided for casts of sculpture at a higher duty than that provided for manufactures of plaster of Paris, or of earthly or mineral substances, would it be seriously contended that the importer of these articles could change them from casts of sculpture to manufactures of plaster of Paris for the purpose of obtaining the benefit of a lower rate of duty by painting or gilding them or performing other work upon them which better fitted them for the use for which they were intended?

III.

The ground of the importers' contention.

The importers rely in this case on a well established principle of law repeatedly applied to the construction of statutes, and particularly to revenue statutes, and recognized by this Court and the sub-

ordinate Federal courts in a multitude of decisions. That principle is that where language used in a former tariff act has received a uniform and consistent interpretation by the department of the Government charged with the execution of the law (in this case the Treasury Department) and Congress in framing new legislation repeats the language of the prior act, it will, in the absence of some *more controlling* consideration, be presumed to have used the language in the meaning and charged with the construction which has been given to it by the executive department.

Schell *v.* Fauche, 138 U. S., 572.
Robertson *v.* Bradbury, 132 U. S., 493.
Robertson *v.* Downing, 127 U. S., 613.
U. S. *v.* Dean Linseed Oil Co., 87 F. R., 456.
Anglo-California Bank *v.* Sec. of the Treasury, 76 F. R., 750.
U. S. *v.* Wotten, 50 F. R., 694.

See also

U. S. *v.* Johnston, 134 U. S., 236.
Bate Refg. Co. *v.* Sulzburger, 157 U. S., 1.
U. S. *v.* Hill, 120 U. S., 169.
U. S. *v.* Philbrick, 120 U. S., 52.
Butterworth *v.* U. S., 112 U. S., 67.
Five per cent. cases, 110 U. S., 484.
Hahn *v.* U. S., 107 U. S., 406.

This is from our point of view the only point involved in this case.

Section 22 of the Tariff Act of July 14, 1870, exempted from duty "philosophical and scientific apparatus * * * casts of marble, bronze, alabaster, or plaster of Paris * * * specially imported in good faith for the use of any society or institution incorporated or established for philosophical, educational, scientific, or literary purposes, or encouragement of the fine arts, and not intended

for sale." Under this statute it was held by the Treasury Department on October 25, 1871 (SS., 948), that

> " Plaster casts imported for the use of an educational institution are exempt from duty under Sections 23, Act of March 2nd, 1861, and 22, Act of July 14th, 1870, when they are imported by the order of such institution."

It will be noted that in this decision *there is no restriction, express or implied, as to the artistic character of the plaster casts.*

Paragraph 759 of the Tariff Act of 1883 exempted from duty " philosophical and scientific apparatus * * * statuary, casts of marble, bronze, alabaster, or plaster of Paris * * * specially imported in good faith for the use of any society or institution incorporated or established for religious * * * purposes or encouragement of the fine arts, and not intended for sale."

Paragraph 771 of the same act exempted from duty " regalia and gems, statues, statuary, and specimens of sculpture, where specially imported in good faith for the use of any society incorporated or established for * * * religious purposes * * * ."

In SS. 7274, decided December 22, 1885, the Treasury Department held that four figures of various sizes which were cast or moulded from a mineral substance and *decorated*, and " were produced in a manner similar to figures and other ornaments manufactured of Parian marble, bisque, terra-cotta, plaster, &c.," imported for St. Joseph's Church, Willimantic, Conn., were entitled to free entry. Secretary Fairchild, in his decision, said:

> " While under numerous decisions of the Department *these figures are clearly not statuary* within the meaning of paragraph 771 of the Free List, yet if the figures are, as claimed, *casts* of the character named in paragraph 759 of the Free List, to wit, casts of bronze, alabaster, or plaster of Paris, or as-

> similate thereto in material, quality, and texture, the Department concurs in your view that under the provisions of Section 2499, Revised Statutes, and of paragraph 759, as aforesaid, they would be entitled to free entry when "specially imported in good faith for the use of a society or institution incorporated or established for religious purposes."

In considering this decision two facts are to be noted. First, that the Treasury Department did not consider that the fact that these figures were decorated excluded them from the free entry allowed to the casts of plaster of Paris imported for the use of a church.

Second, that the Board of Appraisers are clearly in error when they say (at fol. 14 of the Record), that "such figures as these are of a class which was known * * * to classifying officers of customs of the United States on July 24, 1897, and for many years prior thereto as statuary." Here we find the Secretary of the Treasury stating that under numerous decisions of the Department these figures are not statuary within the meaning of a paragraph of the Free List, which is almost identical in language with paragraph 649 of the present act, except that paragraph 649, in order to provide for these articles, has expressly exempted casts of sculpture.

In 1891 the Naval Officer of New York raised the same question as is here involved, and the Treasury Department thus replied to it (SS. 11747):

> "The Department believes that the *crude or inartistic character* of the figures under consideration cannot be urged as a reason for their exclusion from the benefits of free entry."
>
> "It is fair to infer a liberal intention on the part of Congress from the fact of its inclusion of religious institutions among those to which the privilege of free entry is extended. Religious institutions are not schools of art, *nor can congregations without adequate means always consult æsthetic rules in regard to the equipment of their churches.* It

> is the sentiment of pious associations which gives the figure its efficiency as an aid to religious worship, and the *plaster cast may, in this way, be as serviceable to the humbler worshipper as the most costly work of genius.*"

Again in 1893, the president of the Board of General Appraisers, Mr. George C. Tichenor (the author of the opinion of the Board of General Appraisers in this case), addressed a letter to the Department complaining of the free entry of articles of this character, claiming that they were "the products of a certain large manufacturer and importer of church statuary, images, &c.," and expressing the opinion that "the provision for *the free admission of statuary extended only to such works as were the inspired creations of the artist, rather than the works of the artisan or the mechanic, the products of the factory or the workshop.*" This language will be noted as very similar to the language used in the opinion in the present case. To this communication the Department replied:

> "The comments of the Board upon the evident intention of Congress that the objects exempted from duty should be of such high order as to inspire admiration and devotional feeling, elevate the taste, educate and improve the mind, encourage fine art, and minister generally to the higher faculties of mankind, apply to paragraphs 692 and 465 (of the Tariff Act of 1890, which provide for statuary, the professional production of the statuary or sculptor only, and for statues, statuary, and for specimens of sculpture) and not to paragraph 677, *which provides without the restrictions enumerated in paragraph 465, and implied in paragraph 692, for the exemption from duty of all 'casts of plaster of Paris imported in good faith for the use of any society or institution incorporated or established for religious purposes.*"
>
> "Under the last named paragraph, it would appear that any *plaster cast, which shall be regarded by a religious society as a desir-*

able acquisition, and shall be classified by the Collector as coming within the terms of paragraph 677, may be imported free of duty without regard to its artistic character."

"The Department cannot interpret the provisions of paragraph 677 as establishing in any respect an æsthetic standard for such importations, and, without discussing the propriety of such standards, must administer the law according to its apparent intent."

Considering these decisions altogether, we find:

FIRST.—That such articles as those here in question have been held by the Treasury Department to be free as casts for more than a quarter of a century before the enactment of the present Tariff Act.

SECOND.—That the Treasury Department had decided that *they were not statuary* within the meaning of that term even before it was subjected to the limitation now imposed on it, and on which the Board of Appraisers lay so much stress.

THIRD.—That prior to the enactment of the present tariff the suggestion now urged by the Board of General Appraisers, that the free admission of articles of this character should be restricted to those which were of an expensive or artistic character, was expressly repudiated by the Treasury Department.

FOURTH.—That these views of the Treasury Department were not based merely on the claims or representations of importers, without the consideration of adverse arguments and in an apparently superficial manner, but were reiterated after the very author of the present decision had strongly urged upon the Treasury Department a contrary view.

These decisions were before Congress when the present act was drawn. The Treasury Department

had sharply called attention to the fact that the provision for "casts of plaster of Paris" did not contain any words indicating an artistic or æsthetic standard. There is no reason to doubt that in using the words "casts of sculpture" without qualification in paragraph 649 of the present act, Congress intended to continue the liberal policy referred to by the Department with reference to articles imported for churches. There is nothing in the paragraph to indicate any intention of Congress to reverse a long-settled policy.

That the intention of Congress was not to disturb existing conditions with regard to the importation of casts of sculpture for churches, but to leave that provision as it was, charged with the interpretation put upon it by the Secretary of the Treasury, is further emphasized by the proceedings in Congress at the time of the enactment of the law, which, while inadmissible for the purpose of contradicting the plain language of any statute, may always be resorted to for defeating any attempt to induce the courts to disregard the plain meaning of terms.

The Tariff Act of 1897, as originally passed by the House, omitted all provisions for the free introduction of philosophical and scientific apparatus, casts and similar articles for religious or educational societies. Whether this was an inadvertence or a deliberate act of omission can only be left to conjecture. The Finance Committee of the Senate restored in the act provisions corresponding with paragraphs 585 and 603 of the Tariff Act of 1894. One of these, providing for philosophical or scientific apparatus, was passed as originally proposed by the Finance Committee, and is now paragraph 638 of the Act of 1897. The one providing for regalia, statuary and casts, as originally proposed by the Finance Committee, reads as follows:

"Regalia and gems, statues, statuary and specimens or casts of marble, bronze, alabaster or plaster of Paris, where specially imported," &c.

On the 1st day of July, 1897, as appears by the *Congressional Record*, 55th Congress, 1st Session, Vol. 30, part III., p. 2538, Mr. Allison proposed the following amendment:

" In paragraph 622½ (which was the paragraph now constituting paragraph 649 of the Act as passed) line 8 after the word ' gems,' it is proposed to strike out the word ' statues.' In line 9, after the word ' specimens ' to strike out ' or casts of marble ' and insert ' of sculpture in,' and in the same line, after the words ' alabaster or ' to strike out ' plaster of Paris ' and insert ' wood,' so as to read:

" Regalia and gems, statuary and specimens of sculpture in bronze, alabaster or wood," &c.

The amendment was agreed to and the paragraph, as amended was agreed to. In this condition the bill passed the Senate. The Conference Committee, however, recast the paragraph in its present form, and in that form it passed both houses of Congress.

It thus appears that after attention had been called to this matter and it had been the subject of proceedings in the Senate by which the provision for casts was stricken out altogether, Congress on the report of its Conference Committee restored the provision for casts, not in the form which the Senate Finance Committee had originally given to it, but in the identical language of the corresponding paragraph in the Act of 1894.

The inference is irresistible that Congress intended to preserve the provision in the Act of 1894, as interpreted by the Treasury Department in the decisions heretofore quoted.

Casts imported for educational societies have been free of duty since 1816, and casts imported for churches were free of duty from 1861 to 1870 and from 1883 to the present time. The policy of according free admission to articles imported for churches is one which should be approved by the Courts, and the tendency of judicial decisions should

be to give such provisions a liberal interpretation, and not restrict their application by imposing qualifications and limitations which Congress, after having had its attention called to the matter, has seen fit not to impose.

The only effect of imposing such limitatioas as are suggested by the Board of Appraisers to the scope of this paragraph would be to accord free admission to fine works of art imported for wealthy churches, who could best afford to pay duty on them, and deny a similar privilege to the humbler devotional works imported for struggling churches, upon whom the burden of any duty would rest most severely.

In exempting from duty articles imported specially for the use of churches, Congress has simply continued a practice which, as we have seen, has prevailed for many years in our tariff legislation, and which is in line with legislation generally throughout the States, exempting church property from taxation. Congress has inserted in paragraph 649 of the present act a phrase not found in any act prior to that of 1894. It has expressly decreed that "casts of sculpture imported for churches shall be admitted free." If this term is to be subject to the definition or limitation put upon it by the Board of General Appraisers, then the legislation of Congress will be rendered practically nugatory, for such things as the Board of Appraisers would admit as casts of sculpture, to wit, sculptor's models, have never been and are never likely to be imported for the use of churches. So also, if these words are to be restricted, as the Circuit Court would seek to restrict them, to plain white statues, the legislation will be rendered practically nugatory, for such articles are rarely imported and will not answer the purpose of decorating churches.

To sum the whole matter up, the Customs officers, the Board of Appraisers and the Circuit Court have substantially united in destroying a privilege which Congress deliberately accorded to religious institu-

tions in accordance with a long and well-settled and eminently wise and benign policy, and we respectfully submit that they have all fallen into an error which we have a right to have corrected in this Court.

The decision of the Circuit Court of Appeals should be reversed and the articles held entitled to free entry under paragraph 649 of the Tariff Act of July 24, 1897, and the case remanded to the Circuit Court of Appeals, with instructions to enter a mandate in accordance with the decision of this Court.

Dated New York, November 16, 1903.

CHARLES CURIE,
W. WICKHAM SMITH,
Attorneys for Petitioners.

W. WICKHAM SMITH,
Counsel.

APPENDIX.

Free list provisions for casts imported for churches from 1861 to 1897.

ACT OF MARCH 2, 1861, SEC. 23.

"All philosophical apparatus, instruments, books, maps and charts, statues, statutary, busts and casts of marble, bronze, alabaster, plaster of Paris; paintings and drawings, etchings, specimens of sculpture, cabinets of coins, medals, regalia, gems, and all collections of antiquities: *Provided*, the same be specially imported in good faith, for the use of any society incorporated or established for philosophical, literary or religious purposes, or for the encouragement of the fine arts, or for the use or by the order of any college, academy, school or seminary of learning in the United States."

REVISED STATUTES OF 1874, PARAGRAPHS 1708 AND 1726.

"1708. Philosophical and scientific apparatus, instruments, and preparations, statuary, casts of marble, bronze, alabaster or plaster of Paris; paintings, drawings and etchings, specially imported in good faith for the use of any society or institution incorporated or established for philosophical, educational, scientific or literary purposes, or encouragement of the fine arts, and not intended for sale."

"1726. Regalia and gems, and statues and specimens of sculpture, where specially imported, in good faith, for the use of any society incorporated or established for philosophical, literary or religious purposes, or for the encouragement of the fine arts, or for the use or by the order of any college, academy, school or seminary of learning in the United States."

ACT OF MARCH 3, 1883, PARAGRAPHS 759 AND 771.

"759. Philosophical and scientific apparatus, instruments and preparations, statuary, casts of mar-

ble, bronze, alabaster, or plaster of Paris; paintings, drawings and etchings, specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific or literary purposes, or encouragement of the fine arts, and not intended for sale."

"771. Regalia, and gems, statues, statuary and specimens of sculpture, where specially imported in good faith for the use of any society incorporated or established for philosophical, literary or religious purposes, or for the encouragement of the fine arts, or for the use or by order of any college, academy, school, seminary of learning, or public library in the United States."

ACT OF OCTOBER 1, 1890, PARAGRAPHS 677 AND 692.

"677. Philosophical and scientific apparatus, instruments and preparations; statuary, casts of marble, bronze, alabaster or plaster of Paris; paintings, drawings, and etchings, specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific or literary purposes, or for encouragement of the fine arts, and not intended for sale."

"692. Regalia and gems, statues, statuary and specimens of sculpture, where specially imported in good faith for the use of any society incorporated or established solely for educational, philosophical, literary or religious purposes, or for the encouragement of fine arts, or for the use or by order of any college, academy, school, seminary of learning, or public library in the United States; but the term 'regalia' as herein used shall be held to embrace only such insignia of rank or office or emblems as may be worn upon the person or borne in the hand during public exercises of the society or

institution, and shall not include articles of furniture or fixtures, or of regular wearing apparel, nor personal property of individuals."

ACT OF AUG. 27, 1894, PARAGRAPHS 585 AND 603.

"585. Philosophical and scientific apparatus, utensils, instruments and preparations, including bottles and boxes containing the same; statuary, casts of marble, bronze, alabaster, or plaster of Paris; paintings, drawings and etchings, specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or for encouragement of the fine arts and not intended for sale."

"603. Regalia and gems, statues, statuary and specimens or casts of sculpture where specially imported in good faith for the use of any society incorporated or established solely for educational, philosophical, literary or religious purposes, or for the encouragement of the fine arts, or for the use or by order of any college, academy, school, seminary of learning, or public library in the United States, but the term 'regalia' as herein used shall be held to embrace only such insignia of rank or office or emblems as may be worn upon the person or borne in the hand during public exercises of the society or institution, and shall not include articles of furniture or fixtures, or of regular wearing apparel, nor personal property of individuals."

ACT OF JULY 24, 1897, PARAGRAPHS 638 AND 649.

"638. Philosophical and scientific apparatus, utensils, instruments, and preparations, including bottles and boxes containing the same, specially imported in good faith for the use and by order of any society or institution incorporated or established solely for religious, philosophical, educational, scientific or literary purposes, or for the encouragement

of the fine arts, or for the use or by order of any college, academy, school or seminary of learning in the United States, or any State or public library, and not for sale, subject to such regulations as the Secretary of the Treasury shall prescribe."

"649. Regalia and gems, statuary, and specimens or casts of sculpture, where specially imported in good faith for the use and by order of any society incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use and by order of any college, academy, school, or seminary of learning in the United States, or any State or public library and not for sale; but the term 'regalia' as herein used shall be held to embrace only such insignia of rank or office or emblems as may be worn upon the person or borne in the hand during public exercises of the society or institution, and shall not include articles of furniture or fixtures, or of regular wearing apparel, nor personal property of individuals."